NO. 80-495

FILED
DEC 29 1980
MICHAEL RODAK JR. CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DONALD E. LESTER, JR., and
SUE FURGER LESTER

Petitioners

VERSUS

LAURA ANDERSON, EXECUTRIX OF THE ESTATE OF R. C. ANDERSON

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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Attorneys for Respondent

QUESTION PRESENTED

1. Is the Creditor entitled to collect the principal of the debt inspite of the fact that he did not surrender the security instrument when notified that the debtor wished to cancel the transaction, under 15 U. S. C. A. Sec. 1635.

INTERESTED PARTIES

1. Donald E. Lester, Jr., and Sue Furger Lester, Route 1, Natchitoches, Louisiana.

2. Laura Anderson, Executrix of the Estate of R. C. Anderson, Route 2, Robeline, Louisiana.

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II. *Statutes:*

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ARGUMENT

The State Courts have determined that ANDERSON is a creditor and the LESTERS are customers within the contemplation of the Truth-in-Lending Act, 15 U. S. C. A. Sec. 1635.

Creditor admits having received from LESTERS' attorney a letter dated May 5, 1977 stating:

> "Pursuant to the provisions of the Truth-in-Lending Act and Regulation Z thereunder, Donald E. Lester, Jr. and Suzanne Furger Lester hereby elect to rescind the captioned credit transaction entered into with you on January 27, 1975".

ANDERSON further admits that despite the above quoted letter he neither returned the money to the LESTERS nor did he cancel the security instrument as of the date the case was tried in the District Court. Since the opinion of the Louisiana Third Circuit Court of Appeal the mortgage has been cancelled and a return of all money received has been tendered to petitioners.

We point out that in the letter dated May 5, 1977 quoted above nothing was said about returning the ANDERSON'S $70,000.00. The record will show that the LESTERS were heavily in debt, with numerous mortgages and judgments of record against them and it is fair to assume that they well knew that if ANDERSON would cancel his security instrument (mortgage) there would be no way in the world he could, as conditions then existed, enforce collection and they would keep the money and pay no part of it.

The record in this case shows that Mr. Lester was a much more sophisticated business man, though less financially successful, than ANDERSON who had no office, no business telephone, no bookkeeper and no secretary. He did make an

occasional loan. To permit LESTER to keep the money he borrowed and repay no part of it would unjustly enrich him and penalize ANDERSON. Equity is all with ANDERSON. See *Gerasta v. Hibernia National Bank*, 575 F. 2d 580 (5th Cir. 1978); *Harris v. Tower Loan of Mississippi, Inc.*, 609 F. 2d 120 (5th Cir. 1980); and *Bustamonte v. First Federal Savings & Loan Association*, 619 F. 2d 360 (5th Cir. 1980).

It is true that when Congress enacted 15 U. S. C. A. Sec. 1635(b) it laid down seven steps pertaining to the parties involved:

1. Immediately upon recission the customer is relieved of liability for any finance charge or other charge under the contract.

2. Immediately upon recission the security interest becomes void.

3. The creditor, within ten days must return any money or property which the customer may have given.

4. The creditor, within ten days, must take all action necessary to reflect termination of the security interest.

5. The customer may retain any property in his or her possession *until the creditor performs the duties imposed by this section.* (Emphasis added).

6. Upon the creditor's performance of those duties the customer must tender that property back to the Creditor.

7. If the creditor does not take possession of the property within ten days of tender by the customer, ownership vests in the customer.

Nowhere in the statute does it say that ownership shall vest

in the customer if the creditor fails within ten days to return the property and terminate the security. The statute simply states that until the creditor has done those two things, the customer may retain the property in his or her possession.

Petitioners concede that the exception of prescription of one year should have been maintained as to Section 1640 damages, but argue that prescription does not apply to attorney's fees. Section 1640 provides for damages, limited to $1,000.00 and a reasonable attorney's fee. Under 1640(e), any action for such relief must be brought within one year of the violation. If penalties are prescribed in one year, it necessarily follows that attorney's fees are also, because both are provided by the same statute, Section 1640.

We respectfully submit that the writ petitioned for should be denied.

By Attorneys

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CERTIFICATE OF SERVICE

I certify that three copies of the Opposition to Writ of Certiorari have been served upon:

1. Henry B. Bruser, III
   Attorney for Petitioners
   P. O. Box 6118
   Alexandria, Louisiana 71301

2. Catherine L. Stagg, As Amicus Curiae
   Staff Attorney
   Louisiana Department of Justice
   Consumer Protection Section
   1885 Wooddale, Suite 1208
   Baton Rouge, Louisiana 70806

3. James G. Boyle and Paul Kens
   Attorneys for Amicus Curiae
   Consumer Federation of America
   1012 14th Street, N. W.
   Washington, D. C. 2005

by depositing the same in the United States Mail with first class postage prepaid and properly addressed as above shown.

NATCHITOCHES, Louisiana, this 24th day of December, 1980.

Marvin F Gahagan pc m.a.

MARVIN F. GAHAGAN